UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARLINGTON METALS CORPORATION,	)	
	)	
Respondent,	)	
	)	
and	)	**CONSOLIDATED**
	)	
UNITED STEEL, PAPER AND	)	Case No. 13-CA-122273
FORESTRY, RUBBER,	)	Case No. 13-CA-125255
MANUFACTURING, ENERGY,	)	Case No. 13-CA-133055
ALLIED INDUSTRIAL AND SERVICE	)	
WORKERS INTERNATIONAL UNION,	)	
AFL-CIO (USW),	)	
	)	
Charging Party.	)	

REPLY TO THE USW'S ANSWERING BRIEF
AND IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

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In significant part, the Union's arguments mirror the General Counsel's. Accordingly, where the arguments overlap, Arlington Metals Corporation ("AMC") incorporates its Reply to the General Counsel's Answering Brief. As for the Union's additional arguments and mischaracterizations of the record, AMC responds herein.

I. The Union's Answering Brief is Rife With Misrepresentations of the Record

Just like the General Counsel, the Union's account of the parties' bargaining history is a fictitious recreation to make up for factual and legal deficiencies. In addition to the misrepresentations noted in AMC's Reply to the General Counsel's Answering Brief, the Union makes a myriad of factual assertions that are plainly wrong, including without limitation:

- The Union states that Mr. Miossi explained at the outset of the September 12, 2013 bargaining meeting that he was only available to meet until noon. USW Ans. Br. at 6. The record actually shows that when the parties were scheduling the September 12 meeting, Miossi provided notice on multiple occasions that the parties would need to adjourn by noon if they chose to meet that day due to a preexisting conflict, and it was the Union that set an 8:30 a.m. start time and elected to meet on September 12 anyway. R. 5.

- The Union claims that at the October 31, 2013 bargaining session, Miossi stated "'nothing had changed' with regard to the Employer's economic situation since 2009. USW Ans. Br. at 19. That is not true, and there is nothing in the record to support that assertion. The Union's unsubstantiated inference that Miossi's 2013 statement that business conditions had not changed referred to AMC's economic situation is undermined by Miossi's unrebutted testimony that his statement was based entirely and notoriously on AMC's monthly tonnage volume, which was provided to the Union throughout, and nothing else. Tr. 360–61; 450–51.

- The Union claims that at the December 11, 2013 bargaining session, the Union's chief negotiator explained that the Union was very flexible about how to achieve an increase in

employee compensation and was willing to consider profit-sharing or other arrangements. USW Ans. Br. at 9–10, 28. Yet, the bargaining notes of the Union and AMC do not reflect any such "expression of flexibility." GC 10; R. 16. And, in fact, the Union's one proposal in 2013 evidenced no flexibility whatsoever – indeed, it regressed from the Union's March 2012 proposal, the last time the Union put anything forward – and which was rejected by the Company. Tr. 364–67; GC 8; R. 8.

- The Union claims Case No. 13-CA-119043 alleges the Company unlawfully terminated a member of the bargaining committee, Federico Ceja, because of his union activities. USW Ans. Br. at 36. But the charge actually alleges only that AMC "failed to bargain collectively and in good faith with the [Union] when it suspended and terminated Federico Ceja using impermissibly broad discretion and without providing the Union notice and an opportunity to bargain prior to implementing the discretionary suspension and termination to Federico Ceja." GC 3F. The charge contains no allegations that Ceja was terminated because of any protected activities whatsoever. Nor is there any evidence in the record that Ceja was a "union activist," despite the Union's unsupported statements to the contrary. USW Ans. Br. at 27. Instead, the bargaining notes from September 12, 2013, indicate Ceja was fired for aggressively confronting and threatening AMC's Executive Vice President and yelling "fuck you" at him. R. 14.

- The Union's July 10, 2014 inspection request was prompted by the Union's desire to review the Company's compliance with the abatement of approximately 80-100 OSHA citations. USW Ans. Br. at 15. The record reflects that this claim is a gross exaggeration. R. 18; GC 15; Tr. 246–47.

And the USW's misrepresentation of the record go on and on.[1]

[1] Due to the page limitations set forth in the Board Rules, *see* 29 C.F.R. 102.46(h), AMC is not able to correct each of the Union's misstatements. However, the numerous examples of the Union's mischaracterization of the record discredit its arguments because they are not based on the evidence.

II. The General Counsel Failed to Prove AMC Engaged in Surface Bargaining in 2013

Beyond echoing the General Counsel's arguments that AMC's refusal to accede to the Union's 2013 regressive proposal at the parties' 38th bargaining session was surface bargaining,[2] *see* AMC Reply to GC Ans. Br. at 6–8, the Union incorrectly contends that under *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397, 1397 (1978), the ALJ properly confined his analysis to two bargaining sessions that represented only 5 percent of the parties' bargaining history. Because the parties entered into a July 8, 2013 no-admission settlement agreement, the theory goes, the ALJ's review was limited to post-settlement conduct. USW Ans. Br. at 29. This is wrong for many reasons.

First, the settlement agreement to which the Union cites as purportedly limiting the scope of review – which includes a non-admission clause – expressly contemplates that "a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to [pre-settlement] evidence." GC Ex. 3E.

Second, *Hollywood Roosevelt* does not stand for the proposition that judges may not consider pre-settlement conduct where, as here, post-settlement allegations are inescapably

[2] The Union's citations to *Fairhaven Properties, Inc.*, 314 NLRB 763 (1994) and *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 994 (9th Cir. 1992) are misplaced. USW Ans. Br. at 27. In *Fairhaven*, the Board found the employer engaged in surface bargaining because (a) it sought to undermine the union by bypassing the union and attempting to deal directly with the employees and to persuade the employees to abandon the union; (b) made deceptive bargaining statements; (c) submitted mid-bargaining a list of 43 proposals demanding substantial additional concessions by the union; and (d) announced and implemented a unilateral cessation of benefit fund contributions to nonstriking employees, whom the Board found the employer also threatened. *Fairhaven*, 314 NLRB at 772. None of that conduct has been alleged, much less shown, in this matter.

In *Sparks Nugget*, throughout the entirety of bargaining, the employer refused to consider anything but terms of a previous contract updated to current wage levels. *Sparks Nugget, Inc.*, 968 F.2d at 992–95. Here, it is undisputed that AMC reached written tentative agreements with the Union on more than 90 percent of the terms of an overall labor agreement. R. 3, 4; Tr. 327–28, 341–42. And, in reaching these tentative agreements, AMC placed no restrictions on the topics it would discuss, made and responded to proposals, provided reams of information, and gave significant concessions, *including* a concession during bargaining in 2013. Tr. 203–04, 326–29, 370–71; GC 9. In this regard, the Union's claim that "[d]espite making a facial showing of bargaining with the Union by attending negotiation meetings, the Company has not actually engaged in the give-and-take- of collective bargaining," USW Ans. Br. at 31, is laughable.

grounded in pre-settlement conduct. Indeed, in *Midwestern Personnel Services*, 331 NLRB 348 (2000), the Board affirmed the ALJ's finding that "[i]t is well settled that conduct which has been the subject of a settlement agreement may not be litigated in a subsequent proceeding except under certain circumstances, e.g., *where the conduct is used as background evidence*." *Id.* at 352 (emphasis added) (citing *Mooresville IGA Foodliner*, 284 NLRB 1055, 1005 n.3 (1987) (finding proper ALJ's reliance on pre-settlement bargaining conduct in analyzing post-settlement claim of bad-faith bargaining)).

The pre-settlement conduct, which represents 95 percent of the parties' bargaining history, is critical, as Board law instructs "[i]n determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the *totality of the party's conduct*, both at and away from the bargaining table." *Regency Serv. Carts, Inc.*, 345 NLRB 671, 671 (2005); *see also U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000) ("In order to determine whether a party has bargained in good faith, it is *necessary* to examine its *overall conduct*, both at the bargaining table and away from it. Here, we must decide, on the basis of the Respondent's *entire course of dealing*, whether it was lawfully engaged in hard bargaining in an attempt to reach a contract it considered desirable, or whether it merely went through the motions of collective bargaining without any intention of entering into a collective-bargaining agreement.") (emphasis added) (citations omitted).

III. AMC Did Not Provide Misleading or Incomplete Tonnage and Revenue Information Related to the Bargaining Unit

As set forth in AMC's reply brief to the General Counsel's answering brief, in arguing that AMC provided incomplete and misleading tonnage and revenue information by excluding information relating to metal sales, the General Counsel does not address, much less rebut, the testimony of AMC's Executive Vice President, Tim Orlowski, that 100% of the bargaining unit

work at the Franklin Park facility is on the toll-processing side of the business and not metal sales. AMC Reply to GC Ans. Br. at 5–6. So, when the Company measured the volume production and revenue generated by the bargaining unit at the plant, it did so by reference to the toll processing division, not the metal sales division. And, when called upon to produce information to the Union to back up its bargaining assertion that volume was and remained low, the Company produced accurate and complete information concerning volume and revenue of that business.

The Union cites Orlowski's unrebutted testimony that exposes the ALJ's misapprehension of AMC's business, but asserts, with literally no analysis or reasoning, that the ALJ still got it right. USW Ans. Br. at 29. The Union's conclusory endorsement of the ALJ's unsupported findings does nothing to rectify that profound shortcoming.

IV. The Union Provides No Meaningful Answer to AMC's Showing the Withdrawal Petition Was Not "Tainted"

In addition to mirroring arguments raised by the General Counsel and totally ignoring the lack of evidentiary support that *any* petition-signer was aware of any unfair labor practice allegations, *see* AMC Reply to GC Ans. Br. at 8–9, the Union appears to suggest that its filing of Charge No. 13-CA-133055, filed on July 18, 2014, alleging that AMC failed to bargain, refused the Union access on July 10, 2014, to the facility, and unlawfully withdrew recognition of the Union—supports a finding that the petition to withdraw—signed nine days *earlier* on July 9, 2014—was tainted. Short of a breakthrough in metaphysics, it is inherently impossible for an event to have a causal effect on a preceding event.

The Union attempts to salvage the ALJ's faulty reasoning that the unfair labor practices could form the basis of a tainted petition by misstating the record. Citing to Board law holding that the unlawful discharge of a union supporter is a hallmark violation that may support a causal

connection to employee disaffection, the Union fabricates a story that Charge No. 13-CA-119043 alleged the Company terminated a unit employee because of his union activities. But as set forth *supra*, the charge actually alleges only that AMC "failed to bargain collectively and in good faith with the [Union] when is suspended and terminated Federico Ceja using impermissibly broad discretion and without providing the Union notice and an opportunity to bargain prior to implementing the discretionary suspension and termination to Federico Ceja." GC 3F. The charge and record is entirely devoid of allegations that Ceja was terminated because of any protected activities whatsoever. Quite the opposite, the bargaining notes from September 12, 2013, show Ceja was fired—11 months prior to the withdraw of recognition—for aggressively confronting AMC's Executive Vice President and yelling "fuck you" at him. R. 14.

The Union's *actual* allegations merely involve AMC's communications with the Union's external business agent—not any bargaining unit member—and are in no way "coercive" or likely to remain in the employees' memory (assuming they were even aware of the allegations). These allegations fail as a matter of Board law to rise to the level necessary to support a causal relationship with the employees' petition. *See Tenneco Auto., Inc.,* 716 F.3d at 650 ("The Board has consistently held that the types of violations that have detrimental and lasting effects are those involving coercive conduct such as discharge, withholding benefits, and threats to shutdown the company operation"); *Overnite Trans. Co.*, 333 NLRB 1392, 1394–95 (2001) ("numerous serious and pervasive unfair labor practices" consisted of "informing employees that it would be futile to select the Union as their bargaining representative, promising employees better benefits if they voted the Union out, and threatening them with loss of benefits and more onerous working conditions if they voted the Union in").

The cases to which the Union cites could not be more factually distinct from this case. *See Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460, 463–44 (6th Cir. 1992) (refusal to reinstate striking employees' after unconditional offer to return to work); *Beverly Health & Rehab Servs.*, 346 NLRB 1319, 1328–29 (2006) (removal of bulletin boards used by the union to communicate with employees, removal of union-related materials from those bulletin boards, unilateral cancelation of vacations, personal days, and requests for days off without pay; reduction in the hours of an employee who had been selected as the union's negotiator; termination of union supporter; and polling employees to determine union support); *AT Systems West, Inc.*, 341 NLRB 57, 58 (2004) (threats to employees for speaking favorably about the union, solicitation of decertification, direct dealing, and promises of benefits to undermine union support); *United Supermarkets*, 287 NLRB 119, 120 (1987) (unlawful termination of nine unit employees). *None* of the foregoing conduct is at issue in this case.

V. The Union's Arguments Concerning AMC's Authentication of the Petition Ignores and Blatantly Misstates the Record and Board Law

Like the General Counsel, in arguing that AMC failed as a factual matter to authenticate the petition, the Union points to fictional testimony. As detailed in AMC's opening brief, although Orlowski testified without contradiction that he recognized ***all*** of the names on the petition before the withdrawal of recognition, Tr. 101–02, 105–06, the ALJ erroneously surmised that because Orlowski testified he had not seen the signatures of newer employees "very often," he was, therefore, wholly unfamiliar with six signatures of employees hired in the year prior to the withdrawal. ALJD at 34. The General Counsel and Union take the ALJ's flawed analysis one step further and represents to the Board that Orlowski "testified" that he was not familiar with the signatures of six employees on the petition who had been hired in 2013. GC Ans. Br. at 23; Union Ans. Br. at 15. This is a naked misstatement of the record evidence. Tr. 101–02, 105–06.

The Union also argues the General Counsel did dispute the validity of the petition. USW Ans. Br. at 41. But, even the General Counsel does not dispute that nothing in the Complaint directly or indirectly challenges the validity of the petition to terminate Union representation. Indeed, in General Counsel's Answering Brief to Intervenor's Exceptions, General Counsel for the third time in this litigation concedes: "[t]he Complaint does not allege any violation with regard to the 'validity' of the employee petition." GC Ans. Br. to Intervenor's Exceptions at 3; *see also* GC 1(k) at 4; Tr. 107. The Union's conclusory assertions otherwise are baseless.

Finally, the Union argues that Board law requires AMC to authenticate an admittedly valid petition prior to withdrawing recognition. USW Ans. Br. 39–40. But, Board law is clear the burden of an employer to present evidence of authentication only arises where the General Counsel comes forward with evidence rebutting the employer's initial showing a union has lost actual support through a disaffection petition. Indeed, in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board ruled that an employer may lawfully withdraw recognition from an incumbent union only if it can prove that the union has actually lost majority support. *Id.* at 725. An employer that withdraws recognition bears the initial burden of proving that the union suffered a valid, untainted numerical loss of its majority status. *Id.* The employer can establish this loss by a variety of objective means, including an antiunion petition signed by a majority of the unit employees. *Id.* "[A]n Employer with objective evidence [e.g., an antiunion petition] that the union has lost majority support – for example, a petition signed by a majority of the employees in the bargaining unit – withdraws recognition at its peril. *If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition*." *Id.* (emphasis added). The Board further explained:

"*[a]n employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in an 8(a)(5) case if the General Counsel does not come forward with evidence rebutting the employer's evidence.* If the General Counsel does present such evidence, then the burden remains on the employer to establish loss of majority support by a preponderance of the evidence." *Id.* at 725 n.49 (emphasis added). Because the validity of the signatures is conceded, AMC has no further burden to meet.

Beyond ignoring the unequivocal holding of *Levitz*, the Union does not even attempt to reconcile its argument with Board decisions squarely finding that employers need not authenticate a petition *prior* to withdrawing union recognition. *See Flying Foods Group, Inc.*, 345 NLRB 101, 103 n.9, 103–04 (2005) (noting that an employer's withdrawal of recognition is not unlawful where the employer does not verify the authenticity of the signatures on a disaffection petition *before* withdrawing recognition, but if the withdrawal is challenged, the ultimate determination relating to objective evidence justifying withdrawal of recognition because of a loss of majority status does require that the signatures upon a disaffection petition be authenticated); *Latino Express, Inc.*, 360 NLRB No. 112 (2014) (affirming ALJ's finding that an employer's withdrawal based on *contested* petition was unlawful because the employer failed to establish an actual loss of majority where "no effort to authenticate the petition's signatures was undertaken by Respondent *at trial or, as far as the record reveals, otherwise*.") (emphasis added).

AMC withdrew recognition of the Union based on objective evidence showing the explicit wishes of a clear majority of the bargaining unit that they no longer wanted to be represented by the Union. There was otherwise no contract or post-election year bar in effect, and AMC was obligated to respect the wishes of its employees. AMC no longer has a duty to bargain with the Union since the Union is no longer the lawful representative of the bargaining unit.

CONCLUSION

For the reasons stated in AMC's opening brief and above, the ALJ's findings that AMC violated the Act should be reversed and the Consolidated Complaint dismissed.

Dated: October 16, 2015

Respectfully submitted,

ARLINGTON METALS CORPORATION

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Respondent, hereby certifies that he has caused a true and correct copy of the foregoing Reply in Support of Respondent's Exceptions to be served upon:

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via electronic mail where indicated and U.S. Mail, first-class postage prepaid, this 16th day of October, 2015.

/s/ Derek G. Barella
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